Office-Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1058

In the Supreme Court of the United States

OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL., PETITIONERS

v.

W. EUGENE BOWMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

JAMES E. FOX
Associate General Counsel

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

QUESTION PRESENTED

Whether the court of appeals erred in applying to a collective bargaining agreement a judicially-implied duty arising under statutes from which the parties are expressly exempt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1a-13a)[1] is reported at 744 F.2d 1207. The opinion of the district court (Pet. App. 1a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1984. The petition for a writ of certiorari was filed as of December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. Supp. App." refers to the separately bound Appendix to the petition for a writ of certiorari.

STATEMENT

1. The Tennessee Valley Authority (TVA) is a wholly-owned government corporation created by the TVA Act of 1933, 16 U.S.C. 831-831dd. See *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 315 n.1 (1936). Congress has exempted TVA's employment relationships with its employees from the Civil Service laws and regulations, directing in Section 3 of the TVA Act, 16 U.S.C. 831b (emphasis added) that:

> The [TVA] board [of directors] shall *without regard to the provisions of Civil Service laws applicable to officers and employees of the United States,* appoint such * * * employees * * * as are necessary for the transaction of its business, fix their compensation, define their duties, and *provide a system of organization to fix responsibility and promote efficiency.* Any appointee of the board may be removed in the discretion of the board.

Section 6 of the Act further prohibits any "political test or qualification" in TVA employment, requiring TVA to make "appointments and promotions" on the basis of "merit and efficiency" (16 U.S.C. 831e).

These congressional mandates have remained unchanged since their enactment in 1933. 48 Stat. 59-60, 63. In the interim, Congress has confirmed TVA's broad authority, "subject only to the provisions of the [TVA] Act of 1933, as amended," to enter into "such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary" (55 Stat. 775). Congress further expressly excluded TVA, as a wholly-owned government corporation, from the applicability of the National Labor Relations Act and the Labor Management Relations Act, which regulate the terms and conditions of private sector employment (29 U.S.C. 142(3), 152(2)). TVA

was also expressly exempted from the provisions of the Civil Service Reform Act of 1978, which governs the terms and provisions of labor management relations and collective bargaining between most agencies and employees of the federal government (5 U.S.C. 7103(a)(3)(E)).

2. TVA first entered into collective bargaining with employees in 1935, following adoption of its "[E]mployee [R]elationship [P]olicy." See S. Doc. No. 56, 76th Cong., 1st Sess. 56 (1939); 1936 TVA Ann. Rep. 65-66, 304-307.[2] This formal policy permitted employees to organize and bargain with TVA, although "no employee is required to join or refrain from joining an organization." S. Doc. No. 56, *supra,* at 56; S. Rep. 372, 81st Cong., 1st Sess. 10 (1949).[3] Such bargaining led to a contract with unions representing TVA's blue collar or "trades and labor" employees, acting through the Tennessee Valley Trades and Labor Council, in 1940 (S. Rep. 372, *supra,* at 11). By the late 1940's, TVA's experience led to the adoption of a unilateral policy that participation in established labor-management relations, such as membership in a union affiliated with the Council, was a "positive factor[ ] of merit and efficiency" to be considered "in selecting employees for * * * transfer," although such membership was "not a condition of continued employment" (S. Rep. 372, *supra,* at 16). In 1950, after it adopted this policy, TVA entered into the negotiated contract at issue here, the Articles of Agreement, which covers nonmanagement white collar or "salary policy" employees (19[illegible] TVA Ann. Rep. 53). The Articles of Agreement reflect TVA's policy that in making transfer

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[2]S. Doc. No. 56 is the report of a Joint Investigating Committee created in 1938. 52 Stat. 156.

[3]S. Rep. 372 is a report on "Labor-Management Relations in TVA" by the Joint Committee on Labor-Management Relations created by Title IV of the Labor-Management Relations Act. See 61 Stat. 160-161.

decisions union members would be given a preference. Accordingly, union members have priority when volunteering to transfer, and in the event of an involuntary transfer, union members have a preference to remain at their original location.

3. In 1979, respondent Bowman was one of four land appraisers at his grade level working in TVA's offices in Chattanooga, Tennessee. When a need arose to transfer one of these appraisers to Florence, Alabama, Bowman was selected in accordance with the terms of the Articles of Agreement.[4] After he refused to report to Alabama, Bowman was terminated, effective October 29, 1979.

He then sued for reinstatement, alleging two theories for recovery against TVA: (1) that the union preference violated the "merit and efficiency" principles of the TVA Act, and (2) that the preference violated his rights under the First Amendment to freedom of association, and his rights under the Fifth Amendment to equal protection. The unions were joined in this constitutional claim. As a separate, nonconstitutional claim solely against the union defendants, Bowman contended that they had breached an implied duty of fair representation by acceding to the union preference provision.

Following a trial, the district court rejected all of Bowman's claims. The court expressly found that union membership was viewed by TVA as an indicator of "merit and efficiency" (Pet. App. 5a-8a). The district court further found that in order to become a union member a TVA employee need only pay dues (which were used solely for

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[4]At the time, two of the four appraisers were union members. After none of the appraisers volunteered to transfer, the junior nonunion member (Bowman) was chosen. The procedures for involuntary transfer are set out at Pet. App. 4a.

administering the Agreement) (*id.* at 6a, 8a).[5] Concluding that the preference provision "bears a rational relationship to a legitimate governmental objective; *i.e.*, preserving labor relations and, in TVA's view, facilitating TVA's mission" (Pet. App. 14a) and that "[TVA's] interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law" (*id.* at 12a), the district court upheld the union preference provision.

The district court also rejected the "fair representation" claim against the unions. Noting that TVA had concluded that "union membership is an advantage to the TVA," and that the provision "encourages union membership, and discourages 'free riders,' " the court found the preference provision "not arbitrary," "not unfairly discriminatory," and not the product of bad faith in bargaining (Pet. App. 11a).

5. The United States Court of Appeals for the Sixth Circuit reversed. The court of appeals did not reach the constitutional issue, stating that the case "can be decided on a non-constitutional ground which was pled and argued as a discrete claim for relief" (Pet. Supp. App. 12a). Nor did the court of appeals resolve the statutory question whether the union preference violated the TVA Act's "merit and efficiency" principle, 16 U.S.C. 831e. Instead, the court reversed solely because it found the preference provision to be a violation of the "judicially implied duty of fair representation" (Pet. Supp. App. 8a). The court said that (*id.* at 11a):

> [T]he union preference provision does discriminate unlawfully against Bowman and other members of the bargaining unit who do not belong to the unions. The unions enjoy the position of exclusive representatives

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[5]In fact, the Agreement shows that even less is required: If an employee applies but is rejected by the union for membership, TVA still views the employee as a union member entitled to the preference (Jt. Exh. 1a, at 58).

> of employees in Bowman's classification under a contract which permits membership within the unit regardless of whether an employee has chosen to affiliate with a union. The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment.

Accordingly, the court directed that respondent be reinstated and remanded for a trial to allocate damages.

ARGUMENT

In our view, the court of appeals' judgment is erroneous. However, the decision is written narrowly and it therefore may have only a limited effect. For this reason we have not felt justified in seeking review by this Court at the present time.

1. The court's principal error was its reliance on statutory restrictions Congress has expressly stated have no application to TVA's labor relations. The National Labor Relations Act prohibits private sector employers from "encourag[ing] or discourag[ing] membership in any labor organization" by any "discrimination in regard to * * * any term or condition of employment" (29 U.S.C. 158(a)(3)). A "labor organization" is under a similar statutory prohibition against "caus[ing] or attempt[ing] to cause an employer" to take such acts (29 U.S.C. 158(b)(2)). But Congress has exempted TVA from these prohibitions by excluding it from the definition of the term "employer" subject to the statute (29 U.S.C. 142(3), 152(2)).[6] Congress has also expressly excluded TVA and these unions (5 U.S.C.

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[6]Congress similarly excluded the unions here from being considered "labor organization[s]" in their bargaining with TVA. See 29 U.S.C. 142(3), 152(5).

7103(a)(3)(E) and (4)) from the similar prohibitions governing federal "agenc[ies]" and "labor organization[s]" dealing with such agencies (5 U.S.C. 7116).

In exercising its statutory power to "provide a system of organization to fix responsibility and promote efficiency," TVA specifically found that union membership promoted TVA's mission. Accordingly, TVA granted a limited "preference" to such employees in transfer situations. No provision of the TVA Act prohibits TVA from taking such action. Any detriment to nonunion employees was minimal — they still had their jobs, at their same pay rates and with all the same benefits, but simply at another location (with TVA paying their moving expenses), and they were and are under no compulsion to join a union to keep their jobs or any of these benefits.

2. Congress has long been aware of TVA's transfer preference practice and has never expressed its disapproval. In 1949, the report of the Joint Committee on Labor-Management Relations (S. Rep. 372, 81st Cong., 1st Sess. (1949)), advised Congress of TVA's labor practices. The Joint Committee noted (S. Rep. 372, *supra,* at 12-13) that TVA had previously refused a union shop agreement and fully described TVA's unilateral practice of granting union preference (*id.* at 16 (emphasis added)):

> TVA feels that joint labor-management programs are a constructive contribution to job efficiency. Therefore, supervisors are to give recognition to support of and participation in established labor-management relationships on the part of employees as one of the positive factors of merit and efficiency considered in selecting employees for promotion, transfer, or retention in employment. This means that *in selecting employees for* promotion, retention at time of lay-off or *transfer*,

supervisors and personnel officers will consider support of and participation in established labor-management relationships as one of the factors to be taken into consideration along with the factors of ability, experience, and training.

TVA assumes that supervisors who initiate personnel actions resulting in promotion, transfer, or retention at time of lay-off are familiar with the interests of employees in established labor-management relationships as expressed in serving as job steward, participation in the work of training, cooperative, or other joint committees, other participation in joint programs, and *membership in unions affiliated with the council.* Upon request or at their own initiative, personnel officers will advise supervisors on this point.

If employees ask for advice concerning union membership, they are advised that *TVA looks with favor upon affiliation with unions signatory to the general agreement as being conducive to the efficiency of the job. Union membership, however, is not a condition of continued employment.*

Congress has many times since revisited the labor statutes and the TVA Act, but has never amended them to proscribe these practices by TVA. This consistent acquiescence constitutes strong evidence that TVA has correctly discerned congressional intent. See, *e.g., United States* v. *Rutherford,* 442 U.S. 544, 554 n.10 (1979).

3. This Court has made it clear that the federal employment relationship is one governed basically by Congress, in which the courts should be hesitant to intrude by creating common law rights. *E.g., United States* v. *Standard Oil Co.,* 332 U.S. 301 (1947); *United States* v. *Gilman,* 347 U.S. 507 (1954). The Court stated in *Gilman* that (347 U.S. at 511-513 (footnote omitted)):

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.[7]

Here, of course, the situation is even more compelling. Congress has spoken about TVA, and in a manner contrary to the Sixth Circuit's view.

4. Although the court of appeals' judgment is in error, we cannot conclude that further review is warranted at this time. The decision focuses on a duty of fair representation imposed only on the unions. Respondent Bowman did not present and the court of appeals did not reach the statutory question whether the preference provision violated the TVA Act's "merit and efficiency" principle, 16 U.S.C. 831e. Moreover, in the private sector, the union security arrangements at issue here would be deemed unlawful under 29 U.S.C. 158(a)(3), or, if implemented at the behest of a

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[7]See also *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956) (emphasis added):

> The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. *The decision rests with the policy makers, not with the judiciary.*

union, under 29 U.S.C. 158(b)(2).[8] These factors lead us to conclude, with some reluctance, that this case does not meet the usual criteria justifying a grant of certiorari.

Respectfully submitted.

REX E. LEE
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Associate General Counsel

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel
Tennessee Valley Authority

FEBRUARY 1985

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[8]In the Taft-Hartley Amendments of 1947, Congress made a clear policy choice in favor of voluntary unionism, abolishing the provision of the National Labor Relations Act that permitted unions and employers to enter into agreements requiring that employees become union members as a condition of employment. See 93 Cong. Rec. 4885 (1947) (remarks of Sen. Ball). Congress permitted only union security agreements that required employees to become a "member" of the union after 30 days of employment. See S. Rep. 105, 80th Cong., 1st Sess. Pt. 1, at 7 (1947); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-41 (1954). But only financial membership could be required. 29 U.S.C. 158(a)(3) and (b)(2); *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). This Court has characterized the union security arrangement described in the statute as "[t]he only limitation Congress has chosen to impose" on employees' right to "join unions * * * or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union* v. *NLRB*, 347 U.S. at 40.